United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 9, 2010

TO : Alan Reichard, Regional Director

Region 32

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Kindred Hospital 530-8054-0133

Case 32-CA-25350 530-8054-7000

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) when it unilaterally granted employees a wage increase without bargaining with the Union. We conclude that the Employer did not act unlawfully because the Union clearly and unmistakably waived its right to bargain in this regard.

In short, Respondent Kindred Hospital and Charging Party Service Employees International Union-United Healthcare Workers West are parties to a collective bargaining agreement that expired by its terms on October 31, 2008 but has since been extended by written agreement. Section V of Appendix A provides as follows:

Upon ten (10) days written notice to the Union, the Employer may increase the wage scale or any classification within the wage scale. Any such increase shall constitute the new minimum wage rate for the classification or classifications which increase shall not be rescinded without the consent of the Union.

On May 26, 2010, ¹ the Employer's labor relations counsel notified a Union representative by letter that the hospital intended to implement a 1.5% wage increase, per the contract, effective in July 2010. In the letter, counsel noted that the Employer had similarly implemented a 4% increase in June 2009. ² The Union objected to the assertedly "non-contractual" wage increase and demanded bargaining. On June 16, Employer counsel declined the Union's demand, in reliance on contract language. The Employer notified employees of its intention the following week; employees have received the increase since July.

 $^{^{1}}$ All dates are in 2010 unless specified otherwise.

² The Union's negotiator did not know whether the Union objected to the 2009 increase or had filed a grievance.

We conclude that the Employer did not violate Section 8(a)(5) because the Union waived its right to bargain about modifications to the wage schedule during the term of the contract. In Provena St. Joseph Medical Center, the Board reaffirmed its long-held position that a union waives its right to bargain over mandatory subjects only if the waiver is "clear and unmistakable." This standard "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply."4 Waiver of statutory rights will not be "lightly inferred," and the employer bears the burden of establishing that waiver has occurred. 6 In interpreting the parties' agreement, the relevant factors to consider include: (1) the wording of the proffered sections of the agreement at issue; (2) the parties' past dealings; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement or other bilateral arrangements that may shed light on the parties' intent concerning bargaining over the change at issue.

Applying those factors here, we conclude that the Union clearly and unmistakably waived its statutory right to bargain about changes in employee minimum wages. The clear language of the contractual provision, stating that "the Employer may increase the wage scale" unequivocally grants the Employer the privilege, subject only to a tenday notice provision, with which it complied. The Employer took similar action in 2009 when it raised employee wages by 4%. There is no evidence of countervailing bargaining history or application that would tend to diminish the express waiver set forth in the Agreement. Accordingly, we conclude that the Union waived its right to bargain and thus the Employer's conduct does not violate Section 8(a)(5).

B.J.K.

³ 350 NLRB 808, 811 (2007); see also Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983); Johnson-Bateman Co., 295 NLRB 180, 184 (1989) ("It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable.").

 $^{^4}$ Provena, 350 NLRB at 811.

⁵ <u>New York Mirror</u>, 151 NLRB 834, 839 (1965).

⁶ Beverly California Corp., 326 NLRB 153, 153 n.3 (1998).